IN THE HIGH COURT OF DELHI AT NEW DELHI

+ I.A. No. 14129/2009 (under Order IX Rule 13 CPC) & I.A. No. 14130/2009 (under Section 5 of the Limitation Act, 1963 r/w Section 151 CPC) in CS(OS) No. 1982/1999

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Decided on: 8th August, 2011

NATIONAL SMALL INDUSTRIES CORPORATION LTD. .....Plaintiff

Through: Mr. Sanat Kumar and Ms. Poonam, Advocates

Vs.

SSI PRODUCTS MARKETING ORGANISATION LTD. & ANR. .....Defendant

Through: Mr. Sangram Patnaik and Ms. Renu Narula, Advocates for JD-2/Applicant

Coram:
HON'BLE MR. JUSTICE A.K. PATHAK

1. Whether the Reporters of local papers may be allowed to see the judgment? No
2. To be referred to Reporter or not? No
3. Whether the judgment should be reported in the Digest? No

A.K. PATHAK, J.(ORAL)

1. By way of application under Order IX Rule 13 read with Section 151 of the Code of Civil Procedure, 1908 (CPC), judgment debtor no. 2 (hereinafter referred to as 'applicant') has prayed that ex-parte decree dated 21st February, 2006 qua him be set aside. Since there is delay in filing the application, vide IA No.14130/2009 it has been prayed that delay be condoned.

2. Decree holder had filed a suit for recovery of ₹36,76,949.05 against the judgment debtor No.1 and the applicant. It was alleged that pursuant to request of judgment debtor no. 1, decree holder had sanctioned a credit limit of ₹15,00,000/- for financing the bills drawn by

judgment debtor no.1 on various suppliers. In the said credit limit, decree holder discounted various bills drawn on judgment debtor no. 1 by various suppliers namely M/s Royal Foundry, National Brass Engineering Foundry and M/s K.B. Industries and made payments to them on behalf of judgment debtor no.1. Judgment debtor no. 1 defaulted in repaying the loan. Applicant executed a letter of Guarantee dated 31st May, 1996 whereby undertook to pay the dues of decree holder. He also gave an undertaking on 31st May, 1996 that the outstanding amount of ₹17,09,779/- together with interest and service charges shall be paid to decree holder by September, 1996. However, payment was not made hence, the suit.

3. Applicant, did not appear in Court despite service and was proceeded ex-parte vide order dated 6th September, 2000. After service, judgment debtor no. 1 appeared in Court through its lawyer and filed written statement. However, subsequently, judgment debtor no. 1 stopped appearing in Court and was proceeded ex-parte vide order dated 10th August, 2005.

4. Applicant has not disputed the service of summons upon him, however, it is contended that he was the Managing Director of judgment debtor no. 1 at the relevant time. He tendered his resignation which was duly accepted by judgment debtor no. 1 vide letter dated 4th February, 1997. He had nothing to do with the judgment debtor no. 1 at the time when he received the summons as he had already relinquished the post of Managing Director. He handed over the summons to judgment debtor No.1, which represented that applicant need not bother about the summons as every act done by him was on behalf of judgment

debtor no. 1 in his official capacity and the same would be defended by the judgment debtor no.1 diligently. Accordingly, he did not appear in Court to contest the suit. It is further contended that he came to know about passing of decree only on 25th September, 2009, on receipt of notice issued in the Execution Petition No. 371/2000 and there was no inordinate delay in filing the application. Applicant cannot be made liable to pay the amount which was sanctioned and availed by the judgment debtor no.1, inasmuch as, the suit was barred by time. He denied having received any legal notice from the decree holder.

5. Case of the decree holder is that applicant was aware of the pendency of the suit in the year 2000 itself. He did not participate in the proceeding despite service and having knowledge of pendency of the suit, inasmuch as, the application itself had been filed after about 3 and ½ years of passing of the decree and was hopelessly barred by time. It was alleged that applicant had executed separate guarantee/undertaking dated 31st May, 2011, whereby he had categorically undertaken to pay off the debts. Applicant having been duly served and being well aware of the pendency of suit and also having failed to take proper steps at that stage, cannot be now allowed to take benefit of his wrong. It was obligatory on the part of applicant to participate in the proceedings at the appropriate stage. He had failed to furnish "sufficient reasons" for setting aside of ex-parte decree.

6. Order IX Rule 13 CPC reads as under :-

> "In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from

> appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;
>
> Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:
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> Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim."

7. A bare perusal of afore quoted provision clearly indicates that an ex-parte decree passed against a defendant can be set aside only if he satisfies the Court that summons had not been duly served or he was prevented by "sufficient cause" from appearing when the suit was called on for hearing. The Court shall not set aside the decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date of hearing and sufficient time to appear in Court. The second proviso is mandatory in nature and it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein. In other words, the Court shall not set aside the decree even if there is some irregularity in the service of notice if it is satisfied that defendant had notice of date of hearing and sufficient time to appear and answer the plaintiff's claim. In this case, applicant has admitted the service of summons on him. He has not pleaded any irregularity in the service of summons. He was aware of the pendency of suit. He had sufficient time at his disposal to appear in Court and answer the plaintiff's claim either personally or through his counsel. Applicant is an educated person. He was holding

high and responsible post of Managing Director, inasmuch as, during the course of hearing, it has been contended that he had been holding high positions in various companies and public sector organizations. If that is so, he cannot be allowed to feign ignorance about consequence which shall follow on account of non appearance in court despite receiving the summons/notices. Plea taken by him that he had handed over the summons to judgment debtor no. 1, for taking care of his interest in the proceeding and that he was assured by judgment debtor no. 1 that his interest will be watched does not inspire any confidence, inasmuch as, even the name of the officer of judgment debtor no. 1, to whom the said summons had been entrusted and who had allegedly assured him that his interest would be defended in the court of law, has not been disclosed. This plea, otherwise, appears to be improbable as there was conflict of interest between applicant and judgment debtor no.1 as is evident from the written statement wherein it is alleged that the applicant had diverted the funds to the company controlled by the son of applicant. Conduct of the applicant lacks bona fide, inasmuch as, it demonstrates gross negligence and inaction on his part. In my view, applicant has failed to disclose "sufficient cause" from which he was prevented from appearing in the court.

8. In ***Parimal vs. Veena @ Bharti (2011) 2 SCC 545***, Supreme Court has held that "sufficient cause" means that the party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". In para 16, it has been held as under:-

> "In order to determine the application under Order 9 Rule 13 CPC, the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straightjacket formula of universal application."

9. In ***G.P. Srivastava vs. R.K. Raizada & Others (2000) 3 SCC 54,*** Supreme Court has held that under Order 9 Rule 13 CPC an ex-parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing. Unless "sufficient cause" is shown for non-appearance of the defendant in the case on the date of hearing, the court has no power to set aside an ex-parte decree. In ***Sunil Poddar vs. Union Bank of India AIR 2008 SC 1006***, Supreme Court has held that the legal position under the amended Code is not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order V of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons.

10. It is, thus, clear that the second proviso to Order IX Rule 13 is mandatory in nature. A party approaching the court for setting aside

ex-parte decree has to disclose "sufficient cause" by which he was prevented from appearing in the court. "Sufficient cause" would mean that (i) the party had not acted in a negligent manner (ii) he had acted bona fidely but could not appear in court due to the facts and circumstances beyond his control (iii) he had been acting diligently in pursuing the legal remedy available to him. Whether a party has succeeded in disclosing "sufficient cause" depends on facts and circumstances of each case and no straightjacket formula of universal application can be adopted. In this case, applicant was well aware about the pendency of suit right from August/September, 2000 and had ample opportunity to participate in the proceedings while the suit remained pending about for six years. Since applicant was aware of the pendency, even the application for setting aside the ex-parte order is barred by time by about three and a half years for which no plausible explanation is there. However, without going into the question of delay, application under Order IX Rule 13 CPC is being disposed of on merits. All throughout applicant did not bother to find out as to what was happening in the suit. His this conduct itself clearly shows lack of bona fide on his part and shows that he was grossly negligent in pursuing the matter. In my view, he has failed to disclose "sufficient cause" by which he was prevented from appearing in court from 2000 to 2006 when ultimately decree was passed. As regards judgment titled ***Tea Auction Ltd. vs. Grace Hill Tea Industry 2006 (12) SCC 104***, reliance whereupon has been placed by the applicant, the same is in the context of different facts and is of no help to him. In the said case, while setting aside the ex-parte decree, court had directed to furnish security to the extent of ₹37 lakhs either in the form of bank guarantee or cash. In

these facts, it was held by the Supreme Court that conditions can be imposed but such conditions should not be unreasonable or oppressive. Accordingly, security amount was reduced to ₹5 lakhs.

11. For the foregoing reasons, both the above applications are dismissed being devoid of merits.

A.K. PATHAK, J.

August 08, 2011
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